No. 82-2146.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

MASHPEE TRIBE,
PETITIONER,

v.

NEW SEABURY CORP., ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Brief of Respondents Town of Mashpee and Mary Jane Shoop, Individually and as Representatives of a Defendant Class, in Opposition to Petition for a Writ of Certiorari.

ALLAN VAN GESTEL,
GOODWIN, PROCTER & HOAR,
28 State Street,
Boston, Massachusetts 02109.
(617) 523-5700
Attorney for Mary Jane Shoop

JAMES D. ST. CLAIR,
WILLIAM F. LEE,
DAVID H. ERICHSEN,
DONALD R. FREDERICO,
HALE AND DORR,
60 State Street,
Boston, Massachusetts 02109.
(617) 742-9100
Attorneys for the Town of Mashpee

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Counterstatement of Question Presented for Review.

Whether the Court of Appeals abused its discretion in denying a motion to vacate a 1979 judgment which motion was based on no more than a claim that petitioner's former, retained counsel had made tactical errors in the case which was tried five years earlier.

Table of Contents.

Opinions and judgments below	1
Jurisdiction	2
Counterstatement of the case	2
Summary of argument	6
Argument	6
I. The denial of the petitioner's motion to vacate raises no issues of importance beyond this case and therefore does not warrant review by certiorari	6
II. The Court of Appeals applied settled law and correctly declined to vacate its 1979 judgment and recall its mandate	8
Conclusion	12
Appendix 1	1a

Table of Authorities Cited.

CASES.

American Iron & Steel Institute v. E.P.A., 560 F.2d 589 (3d Cir. 1977), cert. denied, 435 U.S. 914 (1978)	10
Estate of Iverson v. Commissioner, 257 F.2d 408 (8th Cir. 1958)	8
Greater Boston Television Corp. v. F.C.C., 463 F.2d 268 (D.C. Cir. 1971), cert. denied sub nom. WHDH, Inc. v. F.C.C., 406 U.S. 950 (1972)	8, 9, 10
Hines v. Royal Indemnity Co., 253 F.2d 111 (6th Cir. 1958)	9
Insurance Group Committee v. Denver & Rio Grande Western Railroad Co., 329 U.S. 607 (1947)	8

Laffey v. Northwest Airlines, Inc., 642 F.2d 578 (D.C. Cir. 1980) 9, 10

Lee v. Terminal Transport Co., 301 F.2d 234 (7th Cir. 1962) 8

Legate v. Maloney, 348 F.2d 164 (1st Cir. 1965) 9

Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899 (D. Mass. 1977) 10

Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978), aff'd sub nom. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979) ("Mashpee I") 1, 3, 4, 6, 7, 10

Mashpee Tribe v. Watt, 542 F. Supp. 797 (D. Mass. 1982), aff'd, No. 82-1562 (1st Cir. May 23, 1983) ("Mashpee II") 2, 5, 11

National Surety Corp. v. Charles Carter & Co., Inc., 621 F.2d 739 (5th Cir. 1980) 8

Powers v. Bethlehem Steel Corp., 483 F.2d 963, (1st Cir. 1973) 8

STATUTES.

25 U.S.C. § 177 3

28 U.S.C. § 1254(1) 2

FEDERAL RULES AND REGULATIONS.

Sup. Ct. R. 17.1 6

25 C.F.R. Part 54 7n

44 Fed. Reg. 7234-37 (February 6, 1979) 7n

No. 82-2146.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

MASHPEE TRIBE,
PETITIONER,

v.

NEW SEABURY CORP., ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Brief of Respondents Town of Mashpee and Mary Jane Shoop, Individually and as Representatives of a Defendant Class, in Opposition to Petition for a Writ of Certiorari.

Opinions and Judgments Below.

The opinion and judgment of the United States Court of Appeals for the First Circuit which the petition sought to vacate is reported at 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S.

866 (1979). That decision affirmed a judgment of the United States District Court for the District of Massachusetts reported at 447 F. Supp. 940 (1978). The order of the United States Court of Appeals for the First Circuit denying the petitioner's motion to vacate is set forth at Pet. 1a-2a.

An earlier opinion of the United States District Court for the District of Massachusetts in this case is reported at 427 F. Supp. 899 (1977).

The opinion and judgment of the United States District Court for the District of Massachusetts in a subsequent, related proceeding is reported as *Mashpee Tribe* v. *Watt*, 542 F. Supp. 797 (D. Mass. 1982). The opinion and judgment of the United States Court of Appeals affirming that decision is set forth as Appendix 1 to this brief.

Jurisdiction.

The order of the United States Court of Appeals for the First Circuit, denying the petitioner's motion to vacate a February 13, 1979 judgment of that court, was entered on February 1, 1983. On May 23, 1983, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including July 1, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Counterstatement of the Case.

On August 26, 1976, the petitioner, the alleged Mashpee Tribe ("the petitioner"), commenced an action in the United States District Court for the District of Massachusetts claiming

title to essentially all of the land in the Town of Mashpee, Massachusetts, and a small portion of land in the adjoining Town of Sandwich, Massachusetts. The petitioner alleged that the Commonwealth of Massachusetts had authorized the alienation of the claimed land by the petitioner's predecessors in contravention of § 12 of the Indian Trade and Intercourse Act of 1834, now codified in part as 25 U.S.C. § 177 ("the Nonintercourse Act"); and that, consequently, the petitioner was entitled to immediate possession of that land and trespass damages.

Specifically, the petitioner contended that, in 1685, the General Court of the Plymouth Colony granted the claimed land to the petitioner's predecessor in interest subject to a restraint on alienation. *Mashpee Tribe* v. *Town of Mashpee*, 447 F. Supp. 940, 949 (D. Mass. 1978), *aff'd. sub nom. Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979) ("*Mashpee I*"). In 1723, this land and its residents were organized as a propriety and, in 1834, as the District of Marshpee. 447 F. Supp. at 944-45. In both its propriety and district forms, the land in Mashpee remained subject to restraints on alienation imposed by the Plymouth Colony and later by the Massachusetts General Court. 447 F. Supp. at 945-46. In 1842, the Massachusetts General Court partitioned and allotted the land in the district to the individual residents subject again, however, to a continued restraint on alienation to non-residents. 447 F. Supp. at 945. In 1869 and 1870, the Massachusetts General Court eliminated its restraint on the conveyance of the previously allotted land to non-residents of Mashpee and incorporated Mashpee as a town. It is these 1869 and 1870 legislative acts which the petitioner asserted violated the Nonintercourse Act.

Mashpee I was submitted to a jury after forty days of trial on the issue whether the petitioner and its claimed predecessors were an Indian tribe within the meaning of the Nonintercourse Act on the date *Mashpee I* was commenced and on certain

other relevant dates. The jury found as a matter of fact that the group was an Indian tribe on March 31, 1834, when the District of Marshpee was established, and on March 3, 1842, the date on which there was a formal partition of land in the district. However, the jury found that the group was not an Indian tribe on July 22, 1790, the date of the enactment of the first version of the Nonintercourse Act; on June 23, 1869, the date on which the Massachusetts General Court removed all restraints on the alienation of Indian land in Massachusetts; on May 28, 1870, the date on which the Town of Mashpee was incorporated; and, on August 26, 1976, the date of commencement of *Mashpee I*. 447 F. Supp. at 943. Based upon the jury's special verdicts, the *Mashpee I* court dismissed the petitioner's claim. On appeal, the United States Court of Appeals for the First Circuit affirmed. *Mashpee Tribe* v. *New Seabury Corp.*, *supra*. On October 1, 1979, this Court denied the petitioner's first petition for a writ of certiorari. 444 U.S. 866 (1979).

On December 18, 1981, the petitioner and certain of its claimed members commenced a second action, again challenging the alienation of the claimed land subsequent to the 1869 and 1870 legislative acts of the Commonwealth of Massachusetts. Because *Mashpee I* had conclusively determined that the petitioner's claimed predecessors were not an Indian tribe in 1869 or 1870, that the petitioner had not been an Indian tribe on the date *Mashpee I* was commenced and, consequently, that the petitioner could not state a claim under the Nonintercourse Act, the respondent Town of Mashpee moved to dismiss this second action on the basis of the doctrines of res judicata and collateral estoppel. The respondent also moved to dismiss the claims of the individual plaintiffs for failure to state a claim upon which relief could be granted.

On June 30, 1982, the District Court dismissed the second action against all defendants except certain United States offi-

cials. *Mashpee Tribe* v. *Watt*, 542 F. Supp. 797 (D. Mass. 1982) ("*Mashpee II*"). The District Court held *inter alia* that (1) the tribal land claims asserted by the petitioner were barred by the doctrines of collateral estoppel and res judicata; and (2) although, for reasons of public policy, it would not apply those doctrines to bar the claims of the alleged individual members of the petitioner, the Nonintercourse Act did not provide the individuals any cause of action.

The petitioner again appealed to the United States Court of Appeals for the First Circuit. On May 23, 1983, that court affirmed, specifically holding that "this effort to relitigate the tribe's claim is barred by elementary principles of res judicata." *Mashpee Tribe* v. *Watt*, No. 82-1562, slip op. at 3 (1st Cir. May 23, 1983); Brief App. at 3a.

After *Mashpee II* had been dismissed by the District Court but while the petitioner's appeal of that decision was pending before the Court of Appeals, the petitioner filed in *Mashpee I* its "Motion to Vacate Judgment and to Enter Substitute Judgment Nunc Pro Tunc." By that motion, the petitioner sought to vacate the 1979 judgment of the Court of Appeals in *Mashpee I* and to substitute a judgment determining the petitioner to be an Indian tribe within the meaning of the Nonintercourse Act despite the jury findings. As the petitioner readily concedes, the only bases for its motion are asserted errors in judgment of the petitioner's *Mashpee I* trial counsel (Pet. 3).

That motion and the supporting memorandum offered by the petitioner were considered by the same panel of judges of the Court of Appeals which had decided *Mashpee I*. After reviewing the motion and memorandum, the Court of Appeals denied the motion on the grounds that there was "no justification for recalling mandate and reconsidering these cases" (Pet. 2a).

Summary of Argument.

The order of the Court of Appeals in issue refusing to vacate a 1979 judgment does not conflict with any decision of this Court, any other court of appeals or any state court of final resort. In addition, the challenged order does not involve any important issue of federal substantive or procedural law. Finally, the Court of Appeals acted within its discretion in denying the motion to vacate a 1979 judgment which motion was based solely upon alleged tactical errors by petitioner's counsel at a trial concluded five years ago.

Argument.

I. The Denial of the Petitioner's Motion to Vacate Raises No Issues of Importance Beyond this Case and Therefore Does Not Warrant Review by Certiorari.

The petitioner does not contend, and indeed could not contend, that the challenged order conflicts with any decision of this Court, Sup.Ct.R. 17.1(c); conflicts with a decision of a state court of last resort, Sup.Ct.R. 17.1(a); or results in a conflict among the courts of appeals, Sup.Ct.R. 17.1(a). Similarly, the order in issue does not decide any important issue of statutory or constitutional law not previously settled by this Court and does not involve any crucial procedural question. Nor does the record even remotely indicate that the Court of Appeals has so far departed from "the accepted and usual course of judicial proceedings . . . as to call for exercise of this Court's power of supervision." *Id.*

Instead, the issue now presented is predicated upon the peculiar and particular facts of *Mashpee I*. The petitioner

argues that its trial counsel in *Mashpee I* erred in permitting the issue of tribal existence within the meaning of the Nonintercourse Act to be submitted to a jury; neglected to argue the legal theory that the petitioner's tribal existence was a legal, and not factual, issue; and failed to present certain documentary evidence which the petitioner incorrectly argues establishes its federal recognition as an Indian tribe[1] (Pet. 3-4). These asserted tactical errors, the petitioner concludes, entitle it to an order vacating the 1979 judgment of the Court of Appeals and to entry of a substitute judgment.

Rather than raising issues sufficiently profound and far reaching to justify review by certiorari, the petitioner's contentions represent no more than a litigant's dissatisfaction with prior judgments which were the result of extended and thorough litigation, which were correct when rendered and are correct today, and which previously were the subject of an unsuccessful petition for certiorari. Because the petition raises no question of importance beyond the factual context of this case but,

---

[1] The petitioner repeatedly and disingenuously alleges that it is a "federally recognized" Indian tribe (Pet. 3, 4, 5, 6). As the petitioner is well aware, it has not qualified for federal recognition under the regulations promulgated by the Department of the Interior. 25 C.F.R. Part 54 (Procedures for Establishing That an American Indian Group Exists as an Indian Tribe). Nor has it been included on the official listing of tribal entities having a government to government relationship with the United States. 44 Fed. Reg. 7234-37 (February 6, 1979).

Equally inexplicable are the petitioner's claims that the United States has never terminated it as a federal Indian tribe and its reliance upon an excerpt from the United States' answer in *Mashpee II* to suggest that it has never been terminated. The complete portion of paragraphs 33-34 of the answer states that the "federal defendants admit that the United States has never terminated the Mashpee Tribe, their community or their Reservation *but aver that the United States has never acknowledged the group as an Indian tribe. Thus Congress would have had no occasion to terminate the group* . . ." (emphasis added to omitted portion).

rather, merely quarrels with the unwillingness of the Court of Appeals to reopen issues and arguments already finally resolved, the petition for a writ of certiorari should be denied.

II. The Court of Appeals Applied Settled Law and Correctly Declined to Vacate its 1979 Judgment and Recall its Mandate.

Absent unusual circumstances, an appellate court is required to "refuse to permit the relitigation of matters or issues previously determined on a former review." *Insurance Group Committee* v. *Denver & Rio Grande Western Railroad Co.*, 329 U.S. 607, 612 (1947). This well settled doctrine has led the courts of appeals to uniformly recognize that the recall of an appellate mandate "is an inherent power of the Court of Appeals reserved for special circumstances and 'sparingly exercised.'" *Powers* v. *Bethlehem Steel Corp.*, 483 F.2d 963, 964 (1st Cir. 1973). *See also Estate of Iverson* v. *Commissioner*, 257 F.2d 408 (8th Cir. 1958). As the Court of Appeals for the District of Columbia Circuit has explained, the power to recall a mandate "is not to be availed of freely as a basis for granting rehearings out of time for the purpose of changing decisions . . . ." *Greater Boston Television Corp.* v. *F.C.C.*, 463 F.2d 268, 277 (D.C. Cir. 1971), *cert. denied sub nom. WHDH, Inc.* v. *F.C.C.*, 406 U.S. 950 (1972). Recall of a mandate is particularly inappropriate where a considerable amount of time has lapsed between the issuance of the mandate and the motion to recall. *See National Surety Corp.* v. *Charles Carter & Co., Inc.*, 621 F.2d 739, 741-42 (5th Cir. 1980) (refusing to recall mandate issued three years before relief from mandate sought); *Lee* v. *Terminal Transport Co.*, 301 F.2d 234, 236 (7th Cir. 1962) (refusing to recall mandate issued 29 months before relief from mandate sought). Equally inappropriate is

the recall of a mandate once rehearing and certiorari have been denied. *See Legate* v. *Maloney*, 348 F.2d 164, 166 (1st Cir. 1965).

The courts of appeals have consistently and uniformly placed strict limitations on their own powers to recall appellate mandates because of "the strong policy of repose, that there be an end to litigation." *Greater Boston Television Corp.* v. *F.C.C.*, *supra*, 463 F.2d at 278. In the words of the Court of Appeals for the District of Columbia Circuit:

> If justice is to be served, there must at some point be an end to litigation; on that account, the power to recall mandates should be exercised sparingly. To warrant divergence from the law of the case, a court must not only be convinced that its earlier decision was erroneous; it must also be satisfied that adherence to the law of the case will work a grave injustice.

Laffey v. *Northwest Airlines, Inc.*, 642 F.2d 578, 585 (D.C. Cir. 1980) (footnote omitted). *See also Legate* v. *Maloney*, *supra*, 348 F.2d at 166 ("If we were in error . . . we believe it would be far greater error to permit reconsideration now after denial of petitions for rehearings and certiorari. There must be an end to dispute."); *Hines* v. *Royal Indemnity Co.*, 253 F.2d 111, 114 (6th Cir. 1958).

As a result of this strong policy of finality, the courts of appeals have recognized at most only five "exceptional circumstances" in which the recall of a mandate may be appropriate. These limited circumstances are (1) to correct clerical mistakes or to make the judgment consistent with the opinion; (2) where there has been a fraud on the court or other misconduct affecting the integrity of the judicial process; (3) where there is a danger of incongruent results in cases pending at the same

time; (4) where it is necessary to revise an unintended instruction to a trial court that produces an unjust result; and (5) where a subsequent decision of this Court showed that the original judgment was "demonstrably wrong." *American Iron & Steel Institute* v. *E.P.A.*, 560 F.2d 589, 594 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978); *Greater Boston Television Corp.* v. *F.C.C.*, *supra*, 463 F.2d at 278-79. Even if any of these circumstances exists, whether a mandate is to be recalled lies in the appellate court's discretion. *See American Iron & Steel Institute* v. *E.P.A.*, *supra*, 560 F.2d at 594-95.

No exceptional circumstances were presented by the petitioner to the Court of Appeals which would have justified overriding "the policy of repose normally accorded past decisions." *Laffey* v. *Northwest Airlines, Inc.*, *supra*, 642 F.2d at 585. Indeed, the petitioner does not even contend that any of these recognized exceptional circumstances exists. Nor does the petitioner refer to any new or old authority conflicting with the 1979 judgment of the Court of Appeals. Further, the petitioner does not offer any documentary evidence which was not available at the time of the trial of *Mashpee I*; in fact, several of the documents appended to the petition as "Appendix B" were introduced into evidence during the *Mashpee I* trial. Finally, the only legal theory the petitioner now addresses — that federal recognition is dispositive as a matter of law of the issue of tribal existence — was raised and decided in *Mashpee I*. *Mashpee Tribe* v. *New Seabury Corp.*, 427 F. Supp. 899, 902-03 (D. Mass. 1977). Indeed, at that time, the petitioner successfully contended that tribal existence was "a question of fact which is susceptible of proof like any other." *Id.* at 903. Having prevailed on that issue but ultimately having failed in its proof, the petitioner's effort to reverse fields five years later does not provide the exceptional circumstances necessary to justify a recall of mandate.

The present petition is no more than another in a series of attempts to circumvent the salutary doctrine of res judicata by attacking the finality of the Court of Appeals' 1979 judgment. First, the petitioner merely refiled its claims to the same land, against the same defendants and predicated upon the same legal theories. When the *Mashpee II* District Court dismissed that second action as barred by the first judgment, the petitioner adopted a new attack by filing its motion to vacate that earlier judgment. The Court of Appeals recognized the motion as another effort to relitigate previously resolved claims and, finding no justification for recalling mandate, properly denied that motion.

Both in its filing of *Mashpee II* and in its bringing of the motion to vacate judgment, the petitioner has demonstrated a consistent disregard for the policies of finality and repose which lie at the core of the judicial system. Those policies are of particular force where, as here, the very pendency of the action calls into question the title of thousands of innocent landowners to thousands of acres of land. This litigation, now nearly seven years old, must once and for all come to an end with the denial of the petition for a writ of certiorari.

Conclusion.

For the above stated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES D. ST. CLAIR,
WILLIAM F. LEE,
DAVID H. ERICHSEN,
DONALD R. FREDERICO,
HALE AND DORR,
60 State Street,
Boston, Massachusetts 02109.
(617) 742-9100
Attorneys for the Town of Mashpee

ALLAN VAN GESTEL,
GOODWIN, PROCTER & HOAR,
28 State Street,
Boston, Massachusetts 02109.
(617) 523-5700
Attorney for Mary Jane Shoop

Appendix 1.

United States Court of Appeals for the First Circuit

No. 82-1562

MASHPEE TRIBE, ET AL.,
PLAINTIFFS, APPELLANTS,

v.

JAMES G. WATT, ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Walter Jay Skinner, *U.S. District Judge*]

Before
Bownes and Breyer, *Circuit Judges*,
and Caffrey,* *District Judge*.

Robert C. Hahn, with whom *William A. Hahn*, and *Hahn & Matkov* were on brief, for appellants.

James D. St. Clair, P.C., with whom *William F. Lee*, *David H. Erichsen*, *Donald R. Frederico*, *Hale and Dorr*, and *Morris Kirsner* were on brief, for appellee Town of Mashpee.

* Of the District of Massachusetts, sitting by designation.

Thomas R. Kiley, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, *Paul R. Matthews*, Assistant Attorney General, were on brief, for appellee Commonwealth of Massachusetts.

May 23, 1983

Per Curiam. We have examined the record in this case and the prior case, *Mashpee Tribe* v. *Town of Mashpee*, 447 F. Supp. 940, 950 (D. Mass. 1978), *aff'd sub nom. Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979), with care, and we have reached three conclusions. First, the decision in the prior case rested on the tribe's inability to prove an essential element of its substantive claim, its continued tribal identity; the dismissal order therefore was a judgment on the merits rather than a dismissal for lack of subject matter jurisdiction. Second, all claims in this case are either the same as, or logically dependent upon, the basic claim presented in the first case — namely, whether the Mashpee Tribe is legally entitled to its "tribal land" in and around Mashpee, Massachusetts. *See generally Epps* v. *Andrus*, 611 F.2d 915 (1st Cir. 1979); *Shulthis* v. *McDougal*, 170 F. 529, 533 (8th Cir. 1909), *appeal dismissed*, 225 U.S. 561 (1912); *United States* v. *Felter*, 546 F. Supp. 1002, 1022 (D. Utah 1982); F. Cohen, *Handbook of Federal Indian Law* 605-11 (1982 ed.). Third, this claim was fairly litigated in the first suit, and the interests of the tribe and its members were fully and fairly represented. *See, e.g., Hansberry* v. *Lee*, 311 U.S. 32 (1940); *Nathan* v. *Rowan*, 651 F.2d 1223 (6th Cir. 1981); *Haas* v. *Howard*, 597 F.2d 654, 657 n.2 (1st Cir. 1978).

Under these circumstances, this effort to relitigate the tribe's claim is barred by elementary principles of res judicata. *See Restatement (Second) of Judgments* §§ 19, 24-25, 41 (1982); 3 Bracton, *On the Laws and Customs of England* 351-52 (S. Thorne trans. 1977) (circa 1250). The addition of other defendants and parcels of land does not change the result, for title to all Mashpee land is what was, and what remains, at stake. *See Mendez* v. *Bowie*, 118 F.2d 435, 440 (1st Cir.), *cert. denied sub nom. Rios* v. *Bowie*, 314 U.S. 639 (1941); *Mertes* v. *Mertes*, 350 F. Supp. 472 (D. Del. 1972), *aff'd by order*, 411 U.S. 961 (1973); *Restatement (Second) of Judgments* §§ 25, 43 comment c (1982). Indian land claims are not entitled to a special exemption from these principles. *See Arizona* v. *California*, 51 U.S.L.W. 4325, 4331 (U.S. Mar. 30, 1983) (dictum); *Heckman* v. *United States*, 224 U.S. 413, 445-46 (1912). Our examination of the trial record confirms our previous conclusion that the trial court was not biased; we deny the plaintiffs' second motion to disqualify the trial judge, as well as all remaining motions.

The judgment of the district court is affirmed. The petition for mandamus and all other motions are denied.